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No. 94-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, ET AL.,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH'S BRIEF IN OPPOSITION

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Question Presented

1. Whether an appropriations act changing the Commonwealth of Massachusetts' contribution toward its employees' health insurance premiums violated the Contracts Clause where a provision of the general laws, enacted prior to any of the contracts at issue, specified that the Commonwealth's contributions for insurance premiums would be established and changed in appropriations acts.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondents Commonwealth of Massachusetts, Secretary of the Executive Office of Administration and Finance, Comptroller of the Commonwealth of Massachusetts, Group Insurance Commission, Board of Regents of Higher Education, and Higher Education Coordinating Council (collectively,

"Commonwealth") submit this brief in opposition to the petition for writ of certiorari ("Pet.").

Decisions Below

The opinion of the Massachusetts Supreme Judicial Court, reproduced at pages A-1-A-9 of the appendix to the petition ("Pet. App."), is reported at 419 Mass. 448, 646 N.E.2d 106 (1995). The earlier decision of the Massachusetts Superior Court is unreported, and it is included in the Appendix to the Petition at pages A-10-A-21.

Jurisdiction

The opinion of the Supreme Judicial Court was entered February 9, 1995. See Pet. App. A-1. The petition was filed May 8, 1995, and was received by the Commonwealth on May 10, 1995. The petitioners invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

Relevant Constitutional and Statutory Provisions

The recitation of pertinent constitutional and statutory provisions set forth at pages 2-3 of the petition is accurate, and the Commonwealth accepts it with two additions.

First, the paragraph in Mass. G.L. c. 32A, § 8 that immediately follows the paragraph quoted by petitioners provides in pertinent part:

> With respect to any period of insurance authorized by this chapter which is in effect for an active employee and dependent, there shall

> be withheld from each payment of salary or wages no more than twenty-five percent of the aforesaid total monthly premium or rate, or, there shall be a lesser amount as provided in the most recent applicable appropriation act. . . .

Second, Mass. G.L. c. 150E, § 7(d), provides in pertinent part that:

> If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to [Mass. G.L. c. 150E, § 6] and . . . any of the following statutory provisions or rules or regulations made thereunder: [list of statutes omitted], the terms of the collective bargaining agreement shall prevail.

The list of statutes in § 7(d) does not include Mass. G.L. c. 32A, § 8.

Statement of the Case

This case arises from a line item in a Massachusetts appropriations act, Mass. St. 1993, c. 110, § 2, item 1108-5200, that changed the Commonwealth's share of public employee health insurance premiums from ninety to eighty-five percent. The appropriations act was enacted in accordance with a section of the Massachusetts general laws that pre-dated the collective bargaining agreements and provided that the Commonwealth's contribution toward employee insurance premiums would be determined in appropriations acts, Mass. G.L. c. 32A, § 8. An accurate statement of the case appears at pages A-1-A-6 (opinion of the Massachusetts Supreme

Judicial Court) of the appendix to the petition.

In brief, the case rests on four facts. *First*, the Massachusetts Legislature has provided by general law since before 1974 that the Commonwealth will pay no less than seventy-five percent of employee insurance premiums. The law further provides that the Commonwealth could contribute a greater percentage "upon approval by way of an annual, or more frequent appropriation act," and that the percentage so set would continue "until changed by a subsequent appropriations act . . . ." Mass. G.L. c. 32A, § 8 (as amended by Mass. St. 1974, c. 794, § 1).[1]

Second, consistent with this provision, the respective contribution percentages of the Commonwealth and its employees have in fact varied over the years, as directed by periodic appropriations acts.[2] Indeed, when the Group

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[1] Similarly, the second paragraph of § 8 specifies that "there shall be withheld from each payment of salary or wages no more than twenty-five percent of the aforesaid total monthly premium or rate, or, there shall be a lesser amount *as provided in the most recent applicable appropriation act.*" Mass. G.L. c. 32A, § 8 (emphasis supplied). Further underscoring the principal role of the appropriations process, the 1974 session law that enacted the present statutory language provides in its transition section that "[t]he seventy-five per cent contribution by the Commonwealth and the twenty-five percent contribution by . . . employees as provided in [c. 32A] prior to the passage of this act shall remain in effect *until an appropriation act changes this ratio* after which the provisions of [§ 8 as amended] shall prevail." Mass. St. 1974, c. 794, § 4 (emphasis supplied).

[2] Throughout the mid-1970's, the Commonwealth contributed the statutory minimum of seventy-five percent. In June 1977, the Legislature increased the Commonwealth's share to eighty

Insurance Commission underwithheld state employees' premiums in 1977 in anticipation of a line item that ultimately did not become law because of a gubernatorial veto, the Commission recouped the underwithholding, even though the then-current collective bargaining agreements contained the vetoed line item's lower employee contribution percentage. *See Group Insurance Commission v. Labor Relations Comm'n*, 381 Mass. 199, 200-201, 408 N.E.2d 851 (1980).

Third, in 1990, petitioner NAGE entered into certain collective bargaining agreements with the Commonwealth (acting through its Office of Employee Relations) that provided that the Commonwealth would contribute ninety percent of the employee insurance premiums, a percentage that represented the level of contributions set forth in the most recent appropriations acts. Although the contracts had a three year term, they remain in effect under open-ended "duration" clauses.

Fourth, in 1993, the Massachusetts Legislature enacted an appropriations act that changed the Commonweath's contribution level to eighty-five percent. Mass. St. 1993, c.

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percent retroactive to January 1, 1977, but only for the six month period until June 30, 1977. Mass. St. 1977, c. 300, § 2, line item 1120-2000. The contribution then reverted to seventy-five percent. *Id.* A year later, the Legislature increased the Commonwealth's share to eighty percent retroactive to July 1, 1977; to eighty-five percent retroactive to January 1, 1978; and to ninety percent effective January 1, 1979. Mass. St. 1978, c. 367, § 2, line item 1120-2000. Subsequent appropriation acts maintained the 90/10 ratio until fiscal 1994, the fiscal year at issue here.

110, § 2, item 1108-5200.

REASONS FOR DENYING THE WRIT

"A review on writ of certiorari is not a matter of right but of judicial discretion." Rules of the United States Supreme Court, Rule 10.1. Such a writ is to be granted "only when there are special and important reasons therefor." *Id.* The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1892).

For the reasons set forth below, the petition does not satisfy the traditional criteria which guide the Court's discretionary review, and it should be denied.

I. THE SUPREME JUDICIAL COURT'S HOLDING THAT THERE WAS NO IMPAIRMENT OF CONTRACT DOES NOT WARRANT REVIEW.

Petitioners repeatedly assert that the Commonwealth has "abrogated" its collective bargaining agreements with NAGE's members. However, the Supreme Judicial Court unanimously held that there was no impairment because the parties negotiating the contracts "did not have the power to bind the Commonwealth to a contribution ratio which could not be altered by the Legislature." Pet. App. A-8. Instead, "[t]he power reserved for the Legislature under [Mass. G.L. c. 32,] § 8 to alter the ratio became an implied term that was incorporated into the contracts." *Id.* at A-7. This unexceptional ruling on a matter initially of state law presents no broad issue of national importance deserving of review.

The threshhold question in Contracts Clause analysis is

whether a change in state law has "operated as a substantial impairment of a contractual relationship." *General Motors v. Romein*, 503 U.S. 181, 186 (1992)(quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that relationship, and whether the impairment is substantial." *Id.* Although the question whether a contract was made for Contract Clause purposes is ultimately one of federal law, the Court "accords respectful consideration and great weight to the views of the State's highest court." *Id.* at 187 (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)). Indeed, this Court has held that reversal would be proper only if the State decision were "manifestly wrong," *Hale v. Iowa State Board of Assessment and Review*, 302 U.S. 95, 101 (1937), and only if the relevant statute "could not have expressed the meaning thus attributed to it" by the State court, *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168, 171 (1947).

The decision below should be accorded great weight because the Supreme Judicial Court reasonably interpreted the state statutes. *See* Pet. App. A.6.-A.8. Massachusetts has specifically addressed the relationship between statutes and collective bargaining agreements in Mass. G.L. c. 150E, § 7(d), which lists statutes that are subordinated to collective bargaining agreements. *Id.* It was well established, before the contracts at issue were entered into, that "statutes not specifically enumerated in § 7(d) will prevail over contrary collective bargaining agreements." *Commonwealth v. Labor Relations Comm'n*, 404 Mass. 124, 126, 533 N.E.2d 1326 (1989). *Accord Burlington v. Labor Relations Comm'n*, 390

Mass. 157, 163, 454 N.E.2d 465 (1983).[3]

The list of statutes that can be superceded by collective bargaining does not include either Mass. G.L. c. 32A, § 8, the statute concerning the Commonwealth's contributions toward insurance premiums, or any other section of c. 32A. Mass. G.L. c. 150E, § 7(d). The Supreme Judicial Court accordingly held that the provision of Mass. G.L. c. 32A, § 8, that mandates the Commonwealth's contribution to employees' insurance premiums be set and be changed in appropriations acts constituted an express "reserved power of the Legislature to reduce the percentage of the Commonwealth's contribution in appropriation acts." Pet. App. at A-6-A-7. It further held that, under well established principles of state law, the Legislature's reserved power to alter the contributions previously set by the Legislature became an implied term of the

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[3] Petitioners suggest that the decision below reflects a change from the Supreme Judicial Court's state law holding in *Boston Teachers Union, Local 66 v. School Committee of Boston*, 386 Mass. 197, 207-209, 434 N.E.2d 1258 (1982). Pet. at 6, 15. However, as the Supreme Judicial Court noted, Pet. App. A-7 n.11, that case addressed the issue whether a municipal collective bargaining agreement funded for the first year is enforceable in its later years, not whether a contractual obligation existed *ab initio*. Section 8 is thus not, as petitioners assert, simply a "state law[] making all expenditures contingent on appropriations." Pet. at 6. It instead reserves to the Legislature the right to set the contribution percentage in the first instance. As the Supreme Judicial Court stressed, "[t]he plain meaning of § 8 is that the percentage of the Commonwealth's contribution . . . is set solely by appropriation acts." Pet. App. A-8 n.12. This uniquely structured state statutory scheme hardly raises the broad national implications that petitioners ascribe to it.

contracts. *Id.* at A-7. *See, e.g., Feakes v. Bozyczko*, 373 Mass. 633, 636, 369 N.E.2d 978 (1977).[4]

The Supreme Judicial Court properly applied its holding in the Contracts Clause context. This Court has held that "state laws are implied into private contracts . . . when those laws affect the validity, construction, and enforcement of contracts." *General Motors v. Romein*, 503 U.S. at 189. *See also United States Trust Co. v. New Jersey*, 431 U.S. 1, 19-20 n.17 (1977) ("the laws which subsist at the time and place of the making of a contract . . . enter into and form part of it, as if they were expressly referred to or incorporated in its terms")(quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934)). Section 8 clearly concerns the validity of the contract insofar as it addresses the Commonwealth's contributions toward insurance premiums.

In sum, the decision below rests on long established principles of state law. The application of these principles to the peculiar statutes at issue presents no questions warranting review by this Court.

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[4] The petitioners refer to the Supreme Judicial Court's interpretation of § 8 as a "fiction" because, in their view, the statute merely describes the appropriation process. Pet. at 11-12. There would be no purpose to such a descriptive statute, however, and the Supreme Judicial Court rejected this reading under the long established principle that "wherever possible, no provision of a legislative enactment should be treated as superfluous." Pet. App. at A-8 n. 12 (quoting *Casa Loma, Inc. v. Alcoholic Beverages Control Comm'n*, 377 Mass. 231, 234, 385 N.E.2d 976 (1979)).

II. THE HOLDING OF NO IMPAIRMENT IS CONSISTENT WITH DECISIONS OF THIS COURT.

The petitioners contend that the Supreme Judicial Court's holding is contrary to this Court's decisions. However, in asserting that the Supreme Judicial Court "manipulat[ed]" the concept of reserved power, Pet. at 11, petitioners ignore the fact that the cases on which they rely generally addressed implied reservations of general police powers, not express statutes addressing the specific benefit at issue and reserving that benefit to the legislative domain in the first instance.

For example, petitioners assert that the Supreme Judicial Court used reasoning rejected in *United States Trust Co. v. New Jersey*. Pet. at 12. However, the Court there discussed only whether a State impliedly reserved the right to alter a contract under its general powers. 431 U.S. at 23-24. As in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. at 435-44, the Court was only concerned with the scope of the State's "protective power," and it did not consider the effect of any express statutory reservation.

Petitioners do refer to two cases where the courts rejected claims that legislative provisions effectively reserved the power to alter a contract. However, the purported reservations were nowhere near as specific as Mass. G.L. c. 31A, § 8. More importantly, here the Supreme Judicial Court did *not* hold that § 8 constitutes a reserved power to alter a collective bargaining agreement. It instead held that the statute reserved to the Legislature the right to set the contribution in the first instance, and that that reservation became an implied term of the

contract. Pet. App. A-7, A-8 n.12, A-9.[5] The holding accordingly does not conflict with the cited cases.

Specifically, in *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58 (1913), the Court merely determined that a *general* power of repeal did not reserve the right to alter contractual rights. *Id.* at 72-74. Indeed, the Court took pains to distinguish *Greenwood v. Union Freight R. Co.*, 105 U.S. 13 (1881), on the ground that that case involved an "unmistakable" reservation of the right of repeal in the "general law of the State." *Id.* at 73. The lower court decision cited by the petitioners also addressed legislation far different from that at issue here. The majority in *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012 (4th Cir, 1993), *cert. denied*, 114 S. Ct. 1127 (1994), held only that a section of the City Charter authorizing the Board of estimates to effect "reductions . . . in appropriations" in case of a revenue deficiency did not clearly evidence an intent to authorize modification of contracts. *Id.* at 1016.[6]

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[5] Section 8 thus does not reserve legislative power to alter the *contract*; it reserves legislative power to alter the percentage previously set by the Legislature. In Massachusetts, as the Supreme Judicial Court emphasized, "the Commonwealth's contribution . . . is set solely by appropriation acts." Pet. App. at A-8 n.12.

[6] There was no issue of legislatively reserved power in *Carlstrom v. State*, 103 Wash.2d 391, 694 P.2d 1 (Wash. 1985), cited by petitioners. The Washington Supreme Court only held that a provision in the contract subjecting it to all present and

By contrast, the provisions of Mass. G.L. c. 32A, § 8, constitute an express reservation of legislative authority of the type contemplated by the Court in *Owensboro* and found in *Greenwood*. See also, *e.g.*, *Public Service Commission of Puerto Rico v. Havemeyer*, 296 U.S. 506, 517 (1936) ("The reserved power to repeal a grant of special privileges implies that it may be exerted at the pleasure of the legislature or other authority in which the power to repeal is vested."). Section 8 provides that the Commonwealth's contribution, if greater than 75%, shall be approved by "annual or more frequent" appropriations act and shall continue at the level set in such an act only until changed by a subsequent act. There is no ambiguity in the statute; the Legislature reserved to itself the power to set the Commonwealth's contributions, to be exercised in annual or more frequent appropriations acts. Since § 8 was in effect before the contracts were entered, the Contracts Clause is not implicated. *See Watson v. Employees Liability Assur. Corp.*, 348 U.S. 66, 70 (1954) (impairment claim is "wholly devoid of merit" where challenged statute "became effective before the insurance contract was made").

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future acts of the legislature did not make the salary schedule contingent upon appropriation where other contracts expressly made the schedule subject to that contingency. *Id.* at 4.

III. PETITIONERS' REMAINING CLAIMS OF CONFLICT FOCUS ON ISSUES NOT REACHED BELOW.

Petitioners assert the existence of conflicts among lower courts on two additional grounds. However, a conflict in the lower courts will not justify review unless it is "real and embarassing." *Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955)(quoting *Layne F. Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)). The asserted conflicts are neither real nor embarassing because they concern issues that the Supreme Judicial Court did not reach.

Petitioners first claim that the decision below is "contrary to" rulings of other courts holding that reduced benefits to employees under collective bargaining agreements constitute "substantial" impairments of contracts. Pet. at 9. They also assert that the "result" in the Supreme Judicial Court runs counter to the "recognition" by a majority of state and federal courts that a State's need for fiscal austerity cannot justify a substantial impairment of contract. Pet. at 16. The Supreme Judicial Court properly did not address these issues. It instead held only that the appropriations act challenged here did not impair any obligation of contract because a pre-existing general law had reserved the determination of the Commonwealth's premium contribution to the Legislature. Pet. App. A-6. It thus did not need to reach the questions of whether an impairment of a collective bargaining agreement is substantial and, if so, whether it can be justified.

With the exception of the cases discussed in Section II above, the decisions on which petitioners rely (1) involved post-contract legislation that cut back on what the courts

determined were contractual benefits and (2) accordingly considered whether the resulting impairment was substantial and justified by fiscal pressures. *Condell v. Bess*, 983 F.2d 415 (2d Cir.), *cert. denied*, 113 S. Ct. 1849 (1993); *Association of Surrogates v. New York*, 940 F.2d 766 (2d Cir. 1991), *cert. denied*, 502 U.S. 1058 (1992); *Opinion of the Justices (Furlough)*, 135 N.H. 625, 609 A.2d 1204 (1992); *Nevada Employees Ass'n v. Keating*, 903 F.2d 1223 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990); *Association of Surrogates v. New York*, 79 N.Y.2d 39, 588 N.E.2d 51 (1992); *Sonoma County Org. of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 591 P.2d 1 (1979). Since the Supreme Judicial Court did not address the substantiality and justification issues, there is no conflict between its decision and the cited cases.[7] In short, even if one were to assume for the sake of argument that there was no justification for a hypothesized substantial impairment of contract on the facts of this case, that does not warrant review of the Supreme Judicial Court's decision holding that there was no impairment under the peculiar Massachusetts statutory scheme.

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[7] Indeed, the Supreme Judicial Court did reach similar issues in another case, and it appears to agree that reasonably foreseeable fiscal constraints do not justify a substantial impairment of contract. See *Massachusetts Community College Council v. Commonwealth of Massachusetts*, 420 Mass. 126, — N.E. 2d — (1995).

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

COMMONWEALTH OF MASSACHUSETTS, SECRETARY OF THE EXECUTIVE OFFICE OF ADMINISTRATION AND FINANCE, COMPTROLLER OF THE COMMONWEALTH OF MASSACHUSETTS, GROUP INSURANCE COMMISSION, BOARD OF REGENTS OF HIGHER EDUCATION, HIGHER EDUCATION COORDINATING COUNCIL,

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